

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
September 20, 2006 Session

STATE OF TENNESSEE v. MARCO M. NORTHERN

Appeal from the Criminal Court for Davidson County
No. 2004-A-664 Steve Dozier, Judge

No. M2005-02336-CCA-R3-CD - Filed June 11, 2007

A Davidson County jury convicted the defendant, Marco M. Northern, of second degree murder, and the trial court imposed an incarcerative sentence of 24 years. On appeal, the defendant asserts (1) that his confession should have been suppressed because the arresting detectives deliberately employed a two-step interrogation technique that undermined and obscured the *Miranda* warnings that preceded his confession; (2) that the evidence is insufficient to support his conviction; (3) that the trial court committed reversible error in permitting a witness to testify that shortly prior to the homicide, the defendant stated that he needed money and was planning to rob someone; (4) that the trial court's jury instruction on flight and the permissible inferences flowing therefrom was prejudicially erroneous; and (5) that his sentence is excessive. After thoroughly reviewing the record, the parties' briefs, and applicable authorities, we find that the interrogation technique did not circumvent the *Miranda* warnings given; that sufficient evidence supports the conviction; that no error occurred in the admission of evidence at trial; and that a jury instruction on flight was warranted. However, we conclude that the trial court erred in applying the 2005 Sentencing Act in the absence of a valid waiver of ex post facto rights. Accordingly, we affirm the defendant's second degree murder conviction but reverse and remand the case for a new sentencing hearing.

**Tenn. R. App. P. 3; Judgment of the Criminal Court is Affirmed in Part
and Reversed in Part, Remanded.**

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which THOMAS T. WOODALL and JOHN EVERETT WILLIAMS, JJ., joined.

Ross E. Alderman, District Public Defender; Jeffrey A. DeVasher, Assistant District Public Defender (on appeal); and Jason Gichner and Amy D. Harwell, Assistant District Public Defenders (at trial), for the Appellant, Marco M. Northern.

Robert E. Cooper, Jr., Attorney General & Reporter; Sophia S. Lee, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Rachel Sobrero and Amy Eisenbeck, Assistant District Attorneys General, for the Appellee, State of Tennessee.

OPINION

This case arises from the October 27, 2003 shooting death of James Combs at the corner of 16th Avenue and Wheelus Street in Nashville. Metropolitan Nashville Police officers were dispatched to the scene at approximately 10:30 p.m., where they discovered Mr. Combs unconscious and in the driver's seat of a red Dodge Ram truck. The truck had run over a fire hydrant and struck a telephone pole, causing the pole to collapse on the hood of the truck. Power lines were draped over the truck, resulting in disruption of electrical power to the neighborhood.

Jaime Scruggs was the first officer on the scene, which was in a problem area involving drugs and prostitution. He briefly assessed the chaotic situation and then requested assistance from Nashville Electric Services, the fire department, and the police department. William McKay was the second officer to arrive at the scene, and although the officers attempted to remove the victim from the truck, their efforts were unsuccessful owing to the telephone pole and the electrical lines. After members of the fire department and electric services arrived and stabilized the dangerous situation, the officers were cleared to remove the victim.

The driver's side door of the truck would not open. Fire department officers broke out the truck window on the passenger side and pried open that door. The victim was removed from the vehicle and placed into an ambulance at which time the gunshot wound was discovered. Officer Scruggs testified to these events at trial and explained that because of the victim's gunshot wound, he summoned assistance from the homicide division and declared the accident scene to be a homicide crime scene.

Homicide Detective Charles Robinson arrived at the scene at approximately 11:30 p.m. He inspected the scene, took notes, and instituted house-to-house questioning to determine if anyone in the neighborhood witnessed what had happened. He testified that he and other officers searched for shell casings but found none. The following day, Detective Robinson attended the victim's autopsy. He noted a gun-shot entrance wound to the left side of the victim's arm, an exit wound on the opposite side of the arm, and another injury to the left side of the victim's chest.

After attending the autopsy, Detective Robinson returned to the scene and resumed canvassing the neighborhood to locate witnesses. Detectives Baltimore, Watson, and Cecil assisted. Detective Robinson testified that he did not develop a formal suspect list but that he had compiled a list of people who may have been on the street at the time of the shooting. By October 29, the detectives had focused their investigation on the area near Cockrill and 16th Avenue. The detectives returned to that area each day until the defendant was arrested. Detective Robinson testified that on November 5, he and the other detectives were in the area talking to a resident when they spotted the defendant walking on the other side of the street. The detectives called out to the defendant, but the defendant ran and eluded the detectives.

The following day, at approximately 4:00 p.m., the detectives returned to the area to search for the defendant. Detective Cecil spotted the defendant in the yard of a nearby residence.

The detectives corralled the defendant, and Detective Robinson testified that he asked the defendant if he knew why the detectives wanted to speak with him. Detective Robinson said the defendant replied, “[A]bout that white man in the red truck.” The defendant explained that he ran from the officers because he had drugs in his possession. Detective Cecil searched the defendant and found marijuana and crack cocaine, whereupon Detective Robinson arrested the defendant for drug possession and transported him to the homicide office in the criminal justice center. The defendant ultimately admitted to shooting the victim in connection with a crack cocaine sale. The defendant told the detectives that the victim, who was driving a red truck, approached him and that the defendant first walked to the passenger side of the truck and then walked to the driver’s side, where he and the victim negotiated for the victim to purchase a small amount of crack cocaine. The defendant said he gave the victim a piece of crack cocaine, but the victim refused to pay for it. The defendant then pulled a gun on the victim. Detective Robinson testified that the defendant provided two different versions why the gun discharged. The defendant claimed, on the one hand, that the truck moved forward, and when the door frame hit his arm, the gun discharged. On the other hand, the defendant said that the gun discharged as he heard the truck engine “rev up.”

Detective Robinson testified that he and other officers searched the victim’s truck and the scene of the shooting, but they never located any crack cocaine. The detective admitted that the amount of crack cocaine would have been very small, and he agreed that glass and power lines littered the street. Officers also looked for but never found any shell casings at the scene.

The State presented the testimony of crime scene investigator Warren Fleak and identification officer Raymond Raider. Officer Fleak testified that because of the moisture in the air, he was unable to process the vehicle for fingerprints. Instead, he only photographed the crime scene and prepared a diagram of the scene with measurements. Officer Raider became involved after the victim’s truck was towed to a secure police tow-in lot. He collected fingerprints from the exterior of the vehicle and searched inside the vehicle where the only item of evidentiary value he found was a .22 caliber, long rifle casing and bullet. Officer Raider testified that he did not find any drugs inside the truck.

McKay, the second officer to arrive at the scene, testified and, for the most part, confirmed Detective Robinson’s account of events. He also testified that he saw no crack cocaine inside the truck that evening, but he agreed that pieces of crack cocaine can be smaller than a pencil eraser, “just a tiny little crumb[] and can be confused with an actual rock or a piece of dirt.”

Doctor Bruce Levy, the Chief Medical Examiner for Tennessee, testified for the State about the autopsy findings. In his opinion, the cause of death was a penetrating gunshot wound to the victim’s left arm and side which led to lethal blood loss. Doctor Levy verified that a therapeutic concentration of Diazepam and metabolites of cocaine were found in the victim’s system.

The gunshot wound had an unusual feature. Doctor Levy explained that there was one entrance wound, but two bullets were recovered. One bullet was recovered in the victim’s armpit, and the second bullet was recovered from the chest wall. He explained that the forensic

reference is to a “tandem bullet.” In that situation, a gun is fired, but the bullet is not actually discharged from the barrel. When a second bullet is fired and discharged, that bullet carries the first bullet such that both bullets enter into the same entrance wound. In this case, the two bullets took slightly different paths when they entered the body. Based on a deposit of black soot around the hole in the victim’s shirt, Dr. Levy testified that the firearm was held six inches or less from the victim’s body when fired. Doctor Levy declined to speculate on the position of the shooter and the victim when the gun was discharged. He agreed that a variety of situations could account for the travel paths of the bullets.

In an effort to debunk the defense theory that the gun accidentally discharged, the State presented the testimony of Kendall Jaeger, an officer in the forensics and firearms section of the police department. The gun that shot the victim was never recovered; therefore, Officer Jaeger conceded that many questions about how the shooting occurred could not be answered. He informed the jury in a general way regarding different kinds of firearms, how firearms might misfire, and accidental and unintentional firings of guns. He verified that the same weapon would sound differently depending on whether the bullet was not discharged or fired in tandem with the second bullet.

The State subpoenaed an acquaintance of the defendant who lived in the same area as the defendant. This acquaintance, Michael Martin, testified that he saw the defendant on October 27, during daylight hours. Martin said that he and the defendant were drinking and having fun. The defendant prepared to leave the area on his bicycle, but before he cycled off, the defendant announced, “I ain’t got no money, I’m flat going to rob somebody.” Martin did not take the defendant’s remark seriously, and Martin continued drinking. He testified that 30 minutes to an hour later, he heard two shots and then a crash. When he walked to the site of the crash, Martin did not observe the defendant’s bicycle anywhere.

At the conclusion of Martin’s testimony, the State rested. The defense presented no proof. From the evidence before it, the jury found the defendant guilty of the lesser included offense of second degree murder. At a separate hearing, the trial court sentenced the defendant to 24 years, as a Range I standard offender, with no early release eligibility. The defendant timely appealed, and the case is properly before us for review.

I. SUPPRESSION MOTION

The defendant filed a pretrial motion seeking suppression of inculpatory statements he made to the arresting officers at the Criminal Justice Center shortly following his arrest. The trial court conducted an evidentiary hearing at which time Detective Robinson testified in detail about the circumstances of the defendant’s arrest and statement. When Detective Robinson stopped the defendant on November 6 and asked if the defendant knew why the detective wanted to speak with him, the defendant responded, “[A]bout that white man in the red truck.” Detective Cecil inquired why the defendant had been running from the officers, and the defendant said because he had “drugs on [himself].” Detective Cecil searched the defendant and discovered marijuana and cocaine.

Detective Robinson testified that “at that time [the defendant] was arrested for the drugs he had on him.”

Detective Robinson transported the defendant to the “Murder Squad Office” at the Criminal Justice Center. The defendant was seated at a table in the center of the office while the officers began preparing the paperwork. Detective Robinson recounted,

[W]e were going to have to [prepare an] arrest report, incident report and do, type up affidavits for the drug charges on the computer. And while we were doing that we were talking, myself, Detective Baltimore and Detective Cecil, basically trying to downplay the incident. . . . We were talking to each other, but [the defendant] could hear us.

The detective denied asking the defendant any questions. Regarding when the defendant began talking, Detective Robinson testified,

Well, you know, he would make statements. Well, I wasn’t even out there that night. He would say stuff, but we just continued on with our statements. And at one point he did admit that he was out there on the night of the shooting. . . . At that point in time, we stopped doing what we were doing and decided I wanted to go ahead and take him across the hall to do a formal interview with him. Before we got ready to go over there I asked him a question. I said Marco, I said, have you ever had a polygraph examination before? He said, no. I said, well that’s a lie detector test. I said, now, it is important that you be truthful with us because, and I said, after you give this, enter this statement to me at some point in time I may ask you to take a polygraph examination, so I’m going to know if you’re being truthful or not. So it’s important for you to tell the truth. At that time we went over to the room, sat down, [and] I read him his *Miranda* rights.

In Detective Robinson’s opinion, the defendant did not appear to be intoxicated or under the influence of drugs when he gave his statement.

On cross-examination, Detective Robinson affirmed that the defendant’s initial arrest was for drug possession, and the detective denied that any discussions occurred in the vehicle en route to the Criminal Justice Center. Detective Robinson estimated that the defendant was seated in the murder squad office for approximately 20 minutes.

Detective Robinson testified that what he meant by describing the conversation among the officers as “trying to downplay” the incident was “making comments that, you know, he, the [victim] shouldn’t have been over there to the neighborhood” and “[t]rying to make it seem like

it wasn't that big of a deal" regarding the shooter. Detective Robinson added, "And that's not my true feeling, but *I was basically saying it because, like I said, I wanted him to talk to me.*" (Emphasis added.) Detective Robinson agreed that the conversation elicited from the defendant an admission that he was present at the time of the shooting, although the detective disputed whether the defendant's statement was incriminating. The detective also admitted that by mentioning a polygraph to the defendant, the detective was attempting to elicit some sort of response from the defendant.

Defense counsel asked about the detective's statement recorded on the video tape after the defendant executed the rights waiver. The detective had addressed the defendant, "Tell me again what happened that night." The detective claimed he was referring only to the defendant's earlier statement about being at the shooting scene, but the detective agreed that the interview was "pretty fast," about 15 minutes, because the detective had to pick up his son. The detective also agreed that he did not prod the defendant and that the defendant gave a full statement.

On redirect examination, Detective Robinson testified that he was not attempting to get a response from the defendant at that moment in time; rather, the detective claimed that he "was trying to prime [the defendant] for [his] future interview" and that his "intent was to put in [the defendant's] mind that, hey, this wasn't no big deal, I can tell them about it."

The defendant testified and disputed most of Detective Robinson's version of events. The defendant said that on the day of his arrest, he had been smoking marijuana heavily for several hours and had ingested a gram of powder cocaine earlier in the day. The defendant testified that while en route to the Criminal Justice Center, Detective Robinson questioned him about his whereabouts the evening of the shooting and advised the defendant that the officers could "place [him] on 16th that night."

The defendant said that Detective Robinson sat in front of him at the table in the Homicide Room, that Detective Baltimore sat at a different table, and that Detective Cecil stood behind him when the questioning began about his whereabouts on the evening of October 27. The defendant denied being in the 16th Street area, and "basically everything they asked [him], [he] denied." The defendant said he recalled Detective Robinson asking if he "want[ed] to take a polygraph." The defendant testified that when he declined, the detective responded, "[W]ell, you don't have to take one because I know you [are] lying to us[,] and I know you know something about this." The defendant said that he became scared because he "didn't think there was no way [he] could get around that polygraph test," and therefore he told the detectives what happened. According to the defendant, a short time later, the detectives asked him about Mario's involvement in the shooting, and he "stopped talking" because he knew "they tricked [him]."

The defendant testified that Detective Robinson escorted him to the interrogation room, placed on the table a paper itemizing the defendant's rights, left the room briefly, returned and instructed the defendant to sign the paper, and then asked the defendant to tell him "what happened again."

On cross-examination, the defendant argued with prosecution counsel whether drugs were still active in his system when he gave his statement.

The State recalled Detective Robinson who denied asking the defendant any questions en route the Criminal Justice Center.

From the proof, the defendant argued that his confession should be suppressed as involuntary because he was under the influence of narcotics at the time and that the officers improperly questioned him and obtained a confession after which he was advised of his rights, signed a waiver, and gave a recorded statement.

The trial court took the matter under advisement and issued an order declining to suppress the confession. Regarding the defendant's under-the-influence-of-narcotics argument, the trial court found that the defendant's suppression testimony was inconsistent in that he testified that he was too intoxicated to understand his rights but that his recollection of what happened before the recorded confession was reliable and should be accepted. The court's order recited that it had "reviewed the video tape and is of the opinion that the defendant was fully aware of the rights he was waiving and appeared to provide coherent responses to the detective's questioning," and the court noted that the "defendant has had previous felony arrests" and "was familiar with the process."

The trial court defined the defendant's unwarned confession argument thusly: "The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires." The trial court noted that no proof had been presented that the detectives' normal method of interrogation was to withhold *Miranda* warnings until a confession was gained. The trial court then considered whether the detectives' actions prior to taping the statements were the functional equivalent of interrogation, and the court concluded that nothing in the evidence indicated that the officers' earlier discussions coerced the defendant or prevented him from understanding his *Miranda* rights and voluntarily speaking with the officer in the interview room. Accordingly, the trial court denied the motion to suppress.

On appeal, the defendant presses his claim that the detectives, through the functional equivalent of interrogation, obtained an incriminating admission from the defendant without administering *Miranda* warning, which later led to a postwarning confession. The defendant does not appeal the trial court's ruling that he was not sufficiently under the influence of narcotics to render his confession involuntary, and we confine our review accordingly.

We are mindful that once a trial court has ruled on a suppression motion, our standard of review requires that we look to the facts adduced at the suppression hearing which are most favorable to the prevailing party. *State v. Daniel*, 12 S.W.3d 420, 423 (Tenn. 2000) (citing *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996)). In considering the evidence presented at the hearing, this court extends great deference to the fact-finding of the suppression hearing judge with respect to weighing credibility, determining facts, and resolving conflicts in the evidence. *Id.*; see also *State*

v. Walton, 41 S.W.3d 75, 81 (Tenn. 2001). These findings will be upheld unless the evidence preponderates otherwise. *Daniel*, 12 S.W.3d at 423. Although deference is given to the trial court's findings of fact, this court conducts its own appraisal of the constitutional questions presented by reviewing the law and applying it to the specific facts of the particular case. *State v. Keith*, 978 S.W.2d 861, 864 (Tenn. 1998) (citing *State v. Yeargan*, 958 S.W.2d 626, 629 (Tenn. 1997)).

The United States and Tennessee Constitutions protect a suspect from "being compelled to give evidence against himself." *State v. Berry*, 141 S.W.3d 549, 576 (Tenn. 2004) (citing U.S. Const. amend. V; Tenn. Const. art. I, § 9). If a suspect is in custody and under State initiated interrogation, the police must first inform him of his Fifth Amendment rights in order for his statements¹ to be admissible as substantive evidence in the trial of the matter. See *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966); *State v. Sawyer*, 156 S.W.3d 531, 534 (Tenn. 2005). Once informed of those rights, a suspect may voluntarily waive them, or he may invoke his *Miranda* right against compulsory self-incrimination. *Id.* at 444-45, 86 S. Ct. at 1612; *State v. Crump*, 834 S.W.2d 265, 269 (Tenn. 1992). To introduce a defendant's statements into evidence at the trial of the matter, the burden rests upon the State to demonstrate a valid waiver by a preponderance of the evidence. See *Colorado v. Connelly*, 479 U.S. 157, 168, 107 S. Ct. 515, 522 (1986).

In this case, it is undisputed that the defendant was "in custody" for *Miranda* purposes. He was under arrest for narcotics possession and confined within the "Murder Squad Office" at the Criminal Justice Center.²

The parties in the present case are sharply divided over whether the defendant was or was not questioned prior to being escorted to the interrogation room where Officer Robinson advised the defendant of his *Miranda* rights. That question is pivotal to our analysis. The State's insistence that no interrogation preceded administration of *Miranda* warnings is, no doubt, motivated by its desire (1) to avoid the "cat out of the bag" rebuttable presumption that a subsequent confession, even if preceded by proper *Miranda* warnings, is tainted by the initial illegality, see *State v. Smith*, 834 S.W.2d 915, 919 (Tenn. 1992), and (2) to sidestep exclusion of postwarning statements when a two-step interrogation is used in a calculated way, see *Missouri v. Seibert*, 542 U.S. 600, 124 S. Ct. 2601 (2004). The defendant's argument is, on the other hand, calculated to favor exclusion of his warned confession per *Seibert*'s treatment of the two-step interrogation technique.

¹ The statements need not be inculpatory. "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612 (1966).

² The defendant did not challenge the admissibility of the remarks he made when the detectives first encountered him. In response to Detective Robinson's question whether he knew why the detective wanted to speak with him, the defendant said, "[A]bout that white man in the red truck." Also, when Detective Cecil inquired why the defendant had been running from the officers, the defendant said because he had "drugs on [himself]." The defendant was not in custody when he uttered these statements.

A. Functional Equivalent of Questioning

Turning to the task at hand, we know that the Supreme Court regards interrogation as “refer[ing] not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.” *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 1689-90 (1980). Interrogation also includes any “practice that the police should know is reasonably likely to evoke an incriminating response from a suspect.” *Id.*, 100 S. Ct. at 1690. The definition of interrogation focuses primarily upon the accused’s perception rather than on the police officer’s intent. *Id.*, 100 S.Ct. at 1690. However, the officer’s intent may be relevant to determine whether the officer should have known his or her words or actions “were reasonably likely to evoke an incriminating response.” *Id.* at 301 n.7, 100 S.Ct. at 1690 n.7.

In *Innis*, the defendant was arrested on suspicion of armed robbery of a cab driver. When arrested, the defendant was unarmed, and he was advised of his *Miranda* rights. Another officer arrived at the scene of the arrest and also advised the defendant of his *Miranda* rights. A police captain thereafter reported to the scene, and the captain also advised the defendant of his *Miranda* rights. The defendant indicated his understanding of those rights and requested to speak with an attorney. *Id.* at 294, 100 S. Ct. at 1686.

Three other patrol officers were directed to transport the defendant to the central police station in a four-door police car with a wire mesh screen between the front and rear seats. The patrol officers seated the defendant in the back seat of the car and shut the doors. The police captain then instructed the officers not to question, intimidate, or coerce the defendant. *Id.*, 100 S. Ct. at 1686.

En route to the police station, two of the officers conversed about the missing gun, with one officer expressing concern about a nearby school for handicapped children and the possibility that one of the children might find a weapon and be injured. The third officer, who did not participate in the conversation, testified at trial that he overheard one officer remark that “it would be too bad if the little – I believe he said a girl – would pick up the gun and maybe kill herself.” The defendant interrupted the officers’ conversation and revealed the location of the gun. *Id.* at 294-95, 100 S. Ct. at 1686-87.

The Court concluded that the conversation just described was not tantamount to interrogation because the “record in no way suggests that the officers’ remarks were *designed* to elicit a response,” and the record did not suggest “that the officers were aware that the [suspect] was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children.” *Id.* at 302-03 & n.9, 100 S. Ct. at 1690 & n.9. That the “officers’ comments struck a responsive chord” does not, without more, establish the suspect was subjected to the “functional equivalent” of *Miranda* questioning. *Id.* at 303, 100 S. Ct. at 1691.

From *Innis* it is clear that actual questioning is not required for the *Miranda* safeguards to come into play. Equally clear is that a conversation between or among officers within hearing range of a suspect can trigger *Miranda* safeguards if the police should know that their words or actions are reasonably likely to evoke an incriminating response. The facts in the present case are distinguishable from those in *Innis*, perhaps most obviously, because there is direct testimonial evidence that the officers' remarks were designed to elicit a response. Detective Robinson testified that he and the officers were intentionally trying to downplay the role that the perpetrator played and were casting blame on the victim, stating that "the guy shouldn't have been over there to the neighborhood." Detective Robinson testified that he was making those comments, not because they reflected his true opinions, but because he wanted the defendant to talk. Regardless whether Detective Robinson wanted the defendant to talk at the table in the homicide room or to be "primed" to talk later, the detective unequivocally testified, "My intent was to put in his mind that, hey, this wasn't no big deal, I can tell them about it." This clear evidence of the officer's intent is indicative that the police should have known that their words or actions were "reasonably likely to evoke an incriminating response."

Additional support for this conclusion is revealed by reaching back into the pages of the Supreme Court's opinion in *Miranda v. Arizona*, in which the Court pointed to specific examples of police practices that trigger the constitutional concern that the "interrogation environment" created by the interplay of interrogation and custody would "subjugate the individual to the will of his examiner" and thereby undermine the privilege against compulsory self-incrimination. 384 U.S. at 457, 86 S. Ct. at 1619. The *Miranda* Court mentioned psychologically based interrogation tactics whereby "officers are instructed to minimize the moral seriousness of the offense, to cast blame on the victim or on society." *Id.* at 450, 86 S. Ct. at 1615 (footnotes omitted). In *Innis*, the Supreme Court again noted this tactic and other interrogation practices to explain why the "interrogation environment" is not limited to express questioning. *See Innis*, 446 U.S. at 301 n.7, 100 S. Ct. at 1690 n.7 ("In particular, where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect."). "It is clear that these techniques of persuasion, no less than express questioning, were thought, in a custodial setting to amount to interrogation." *Id.* at 299, 100 S. Ct. at 1689.

The practice, noted in *Miranda* and again recalled in *Innis*, is reflected in Detective Robinson's testimony that he and the officers were intentionally trying to downplay the role that the perpetrator played and were casting blame on the victim, stating that "the guy shouldn't have been over there to the neighborhood." This testimony mirrors the interrogation instructions to officers "to minimize the moral seriousness of the offense" and "to cast blame on the victim or on society." *See Miranda*, 384 U.S. at 450, 86 S. Ct. at 1615.

The trial court in the instant case ruled as follows:

Detective Robinson testified that he was discussing the facts of the murder case with other detectives while the defendant was sitting in

the murder squad office. According to the testimony, the defendant voluntarily acknowledged his involvement in the crimes. There is nothing to indicate the officers' earlier discussions coerced the defendant or prevented him from understanding his *Miranda* rights and voluntarily speaking with the officer in the interview room.

The record supports the factual recitation that Detective Robinson was discussing the facts of the murder case with other detectives, that the defendant was sitting in the murder squad office, and that while in the office, the defendant acknowledged his involvement in the crime. We are bound by these facts, but only so far as they go. *See Walton*, 41 S.W.3d at 81 (“[I]ssues of whether a defendant was placed in custody, interrogated, or voluntarily gave a confession are primarily issues of fact.”). The trial court gave no indication whether it considered Detective Robinson’s testimony about his intentions and reasons for his actions and comments. Our consideration of this testimony, which *Innis* regarded as legally relevant, does not stray from our standard of review. Taking Detective Robinson’s testimony at face value, we conclude that the detectives should have known that their words or actions were “reasonably likely to evoke an incriminating response” such that the defendant was subjected to the functional equivalent of questioning before ever being advised of his rights pursuant to *Miranda*.

Thus, the defendant’s prewarned statement that he was present when the victim was shot was inadmissible. No reversible error results from the determination, however, because the State never offered the statement as evidence at trial.

We move now to the principles governing the admissibility of the postwarned statement.

B. Question-First, Warn-Later Tactic

In *Missouri v. Seibert*, 542 U.S. 600, 124 S. Ct. 2601(2004), a plurality opinion, the Supreme Court examined the police practice of midstream recitation of *Miranda* warnings after interrogation and an unwarned confession had been obtained. The interrogating officer in *Seibert* had described the technique she had been taught as follows: “[Q]uestion first, then give the warnings, and then repeat the question ‘until I get the answer that [the suspect has] already provided once.’” 542 U.S. at 605-06, 124 S. Ct. at 2605.

A majority of the Court agreed that this police protocol involving midstream recitation of warnings after interrogation and an unwarned confession certainly had the potential to

circumvent, undermine, and obscure *Miranda*,³ and a majority voted to suppress Seibert's confession extracted by officers after deliberately issuing *Miranda* warnings midstream.

The majority, however, split four to one regarding how to evaluate whether the two-step interrogation technique could be salvaged so that the warnings could function effectively as *Miranda* envisioned. For the plurality,

[t]he threshold issue when interrogators question first and warn later is . . . whether it would be reasonable to find that in these circumstances the warnings could function “effectively” as *Miranda* requires. Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier?

Id. at 611-12, 124 S. Ct. at 2610.

The plurality viewed the answer to that question as dependant on five factors: (1) “the completeness and detail of the questions and answers in the first round of interrogation,” (2) “the overlapping content of the two statements,” (3) “the timing and setting of the first and the second,” (4) “the continuity of police personnel,” and (5) “the degree to which the interrogator’s questions treated the second round as continuous with the first.” *Id.* at 615, 124 S. Ct. at 2612. Examining those factors, the plurality concluded that the midstream warnings given to Seibert did not adequately convey to her that she retained a choice about continuing to talk. *See id.* at 616-17, 124 S. Ct. at 2612-13.

Justice Kennedy concurred in the result, adding the fifth vote for suppression, but he rejected the plurality’s multi-factor test as “cut[ting] too broadly.” *Id.* at 622, 124 S. Ct. at 2616 (Kennedy, J., concurring). He espoused what he termed “a narrower test” that when the two-step interrogation is “used in a calculated way,” postwarning statements “must be excluded unless curative measures are taken before the postwarning statement is made.” *Id.*, 124 S. Ct. at 2616

³ The Court articulated the potential in the following fashion:

By any objective measure, . . . it is likely that if the interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content. . . . Thus, when *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and “depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.” *Moran v. Burbine*, 475 U.S. 412, 424, 89 L. Ed. 2d 410, 106 S. Ct. 1135 (1986).

Seibert, 542 U.S. at 613-14, 124 S. Ct. at 2610-11.

(Kennedy, J., concurring). An example of a curative measure is “a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning,” which allows the suspect to distinguish the two contexts and realize “that the interrogation has taken a new turn.” *Id.*, 124 S. Ct. at 2616 (Kennedy, J., concurring). An additional warning may suffice if it “explains the likely inadmissibility of the prewarning custodial statement.” *Id.*, 124 S. Ct. at 2616 (Kennedy, J., concurring).

Arguably, Justice Kennedy’s reasoning controls because he supplied the fifth vote and because his concurrence resolved the case on narrower grounds than did the plurality. *See Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 994 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . .’”); *United States v. Naranjo*, 426 F.3d 221, 231-32 (3d Cir. 2005) (finding Justice Kennedy’s concurrence controlling); *United States v. Mashburn*, 406 F.3d 303, 308-09 (4th Cir. 2005) (finding Justice Kennedy’s concurrence controlling); *United States v. Stewart*, 388 F.3d 1079, 1090 (7th Cir. 2004) (finding Justice Kennedy’s concurrence controlling). *But see United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1139-42 (9th Cir. 2005) (Berzon, J., dissenting) (raising uncertainty whether Justice Kennedy’s concurrence resolved the case on narrower grounds than the plurality).

The facts in this case do not neatly fit within *Seibert* wherein the officers conducted a traditionally structured interrogation (consisting of specific questions and specific responses) for 30 to 40 minutes until the defendant admitted that the death was not accidental. In the present case, Officer Robinson did not engage in any prewarned extended interview, solicit a full confession, and then lead the defendant back through his confession after providing *Miranda* warnings.

The defendant, in turn, responds by pointing to cases from other jurisdictions that have “found *Seibert* violations . . . when . . . a defendant’s pre-*Miranda* statements were inculpatory, but did not amount to a confession of guilt.” However, the beginning paragraph in *Seibert* informs us that the case “tests” a specific “police protocol for custodial interrogation.” *Seibert*, 542 U.S. at 604, 124 S. Ct. at 2605. That protocol “calls for giving no warnings of the rights to silence and counsel until interrogation has produced a confession,” after which “the interrogating officer follows it with *Miranda* warnings and then leads the suspect *to cover the same ground a second time.*” *Id.*, 124 S. Ct. at 2605 (emphasis added). Moreover, Justice Kennedy’s approach arguably does not apply unless an “interrogator uses this deliberate, two-step strategy, predicated upon violating *Miranda* during an *extended interview.*” *Id.* at 621, 124 S. Ct. at 2615 (Kennedy, J., concurring) (emphasis added).

Even assuming *Seibert* controls and applying both the multi-factor test of the *Seibert* plurality and Justice Kennedy’s arguably narrower test, it is clear that the *Miranda* warnings as administered in the defendant’s case would meaningfully apprise a reasonable suspect of his right or choice to remain silent and were thus effective in this case.

Regarding the *Seibert* plurality's test, the first factor to consider is "the completeness and detail of the questions and answers in the first round of interrogation." *Id.* at 615, 124 S. Ct. at 2612. Because the defendant was asked no questions and gave no answers before he received the *Miranda* warnings, this factor strongly suggests that the warnings were effective.

The second factor examines the degree to which the defendant's prewarning and postwarning statements overlapped. *See id.* at 615, 124 S. Ct. at 2612. Given that the defendant made only a single brief incriminating statement in the prewarning stage, the complete interrogation of the defendant that followed the warnings bore little resemblance to his prewarning statement. *Seibert* noted that after the officer finished the unwarned phase of the interrogation, "there was little, if anything, of incriminating potential left unsaid." *Id.* at 616, 124 S. Ct. at 2612 (plurality opinion). In contrast, the only incriminating statement the defendant made during the prewarning stage was an admission that he was present when the shooting occurred. The defendant provided all of the detailed incriminating information after he had waived his *Miranda* rights. Accordingly, the second factor mentioned by the plurality also demonstrates strongly that the defendant's postwarning statements were properly admitted.

The third *Seibert* plurality factor examines the timing and setting of the two rounds of questioning. *Id.* at 615, 124 S. Ct. at 2612. Although this factor favors the defendant, in our opinion it carries little weight because the defendant was asked no questions and gave no answers in the first phase of the interview conducted by the functional equivalent of questioning.

Concerning the fourth and fifth factors, the continuity of police personnel and of the two rounds of questioning, *Seibert* focused on whether it would have been unnatural at the second stage to repeat what had been said during the first stage and on the "oddity of warning about legal rights . . . after the police had led [the suspect] through a systematic interrogation." *Id.* at 615-17, 124 S. Ct. at 2612-13. In this case, because the defendant said very little in the first stage, there was virtually nothing for him to repeat during the second round of interrogation.

Therefore, applying the plurality's multi-factor test, we are of the opinion that the prewarning interaction did not render the *Miranda* warnings ineffective to a reasonable suspect, and the defendant's waiver of his *Miranda* rights was voluntary and constitutionally valid.

In addition, we cannot conclude that the technique employed here is of the type that was the narrow focus of Justice Kennedy's opinion. Detective Robinson did not engage in the type of two-stage questioning that Justice Kennedy concluded distorted *Miranda* and required *Miranda* plus curative steps. *Seibert*, 542 U.S. at 622, 124 S. Ct. at 2616 (Kennedy, J., concurring). This is not to say that Justice Kennedy's test for admission of postwarning statements has been satisfied; rather, we conclude that his test does not apply to this type of interrogation.

Accordingly, we hold that *Seibert* does not bar the admission of the defendant's postwarning statements on Fifth Amendment grounds.

Interpreting and applying *Seibert* are matters of first impression in Tennessee. We should not, however, lose sight that even if *Seibert* does not reach the factual scenario in the present case, the defendant's warned confession does not thereby become automatically admissible. The effect of the defendant's initial unwarned incriminating statement on the later waiver of *Miranda* rights is reviewed pursuant to the guidelines set forth in *State v. Smith*, 834 S.W.2d 915 (Tenn. 1992). In *Smith*, the Tennessee Supreme Court held on state constitutional grounds,

[E]xtraction of an illegal, unwarned confession from a defendant raises a *rebuttable* presumption that a subsequent confession, even if preceded by proper *Miranda* warnings, is tainted by the initial illegality. That presumption may be overcome by the prosecution, however, if the State can establish "that the taint is so attenuated as to justify admission of the subsequent confession."

Id. at 919.

The supreme court identified the central inquiry as being "whether the events and circumstances surrounding and following the initial, illegal conduct of the law enforcement officers prevented the accused from subsequently (1) making a free and informed choice to waive the State constitutional right not to provide evidence against one's self, and (2) voluntarily confessing . . . involvement in the crime." *Id.* To address the inquiry, the supreme court directed courts to examine the following factors:

1. The use of coercive tactics to obtain the initial, illegal confession and the causal connection between the illegal conduct and the challenged, subsequent confession;
2. The temporal proximity of the prior and subsequent confessions;
3. The reading and explanation of *Miranda* rights to the defendant before the subsequent confession;
4. The circumstances occurring after the arrest and continuing up until the making of the subsequent confession including, but not limited to, the length of the detention and the deprivation of food, rest, and bathroom facilities;
5. The coerciveness of the atmosphere in which any questioning took place including, but not limited to, the place where the questioning occurred, the identity of the interrogators, the form of the questions, and the repeated or prolonged nature of the questioning;

6. The presence of intervening factors including, but not limited to, consultations with counsel or family members, or the opportunity to consult with counsel, if desired;
7. The psychological effect of having already confessed, and whether the defendant was advised that the prior confession may not be admissible at trial;
8. Whether the defendant initiated the conversation that led to the subsequent confession; and
9. The defendant's sobriety, education, intelligence level, and experience with the law, as such factors relate to the defendant's ability to understand the administered *Miranda* rights.

Id. 919-20. The court cautioned that no single factor is determinative; instead, "a court must examine the totality of the circumstances surrounding the two confessions to determine whether the subsequent confession by the defendant can truly be termed a knowing and voluntary statement." *Id.* at 920.

Having carefully considered *Smith* and the record in this case, we conclude that the *Miranda* warnings in the defendant's circumstances could and did function effectively, that the defendant voluntarily waived his *Miranda* rights, and that the defendant's warned statements are admissible under both *Seibert* and *Smith*.

First, pursuant to *Smith*, the record reveals no "coercive" tactics employed to elicit either the first admission or the second incriminating confession. There is no evidence in the record that the defendant was in any way mistreated during that time period or that he was prevented from contacting friends, family, or legal counsel. There was no hostility, and the officers and the defendant were respectful of each other. From the time of arrest, the detention was not unduly prolonged, and there is no evidence that the defendant was deprived of food, rest, or bathroom facilities. The defendant was escorted from the homicide office to the interrogation room before express questioning occurred. The defendant received appropriate *Miranda* warnings before confessing his involvement in the shooting, and there is no indication that the defendant did not fully understand the rights explained to him. Indeed, the defendant acknowledged that he understood his rights and signed a written waiver of them. Moreover, the trial court rejected the defendant's argument that narcotics impaired his judgment, and the trial court found that the defendant was fully aware of the rights he was waiving, that he appeared to provide coherent responses to the detective's questioning, and that he had previous arrests and was familiar with the process. The interrogation producing the statement, moreover, was not unduly prolonged such that it could be characterized as an effort to wear down the defendant's resistance and overcome his free will.

We do not ignore counter-weighting factors. No significant time elapsed between the defendant's admission that he was present at the scene of the shooting and his confessed involvement in the shooting. Also, Detective Robinson maintained control of the interrogation environment, and the record indicates no intervening events occurred. We note that Detective Robinson did not advise the defendant that his earlier admission may not be admissible at trial.

From the guidelines set forth in *Smith*, however, we are mindful that a decision demands more than tallying a ledger. In the end, these factors are only useful tools meant to focus attention. The ultimate decision requires a hard look at all of the circumstances. As in *Smith*, that assessment leads us to conclude that the defendant knowingly and voluntarily waived his right against self-incrimination prior to giving the confession introduced at trial in this matter. The prosecution successfully rebutted the presumption that the unwarned incriminating admission tainted the subsequent confession given by the defendant. As a result, that second statement was properly admitted at trial.

In summary, we conclude that the *Miranda* warnings in this case did not fail to offer the defendant or a reasonable suspect a genuine choice whether to follow up on his earlier admission. The *Miranda*-warned confession was properly admitted at trial, and we affirm the trial court's denial of the defendant's suppression motion.

II. SUFFICIENCY OF THE EVIDENCE

The defendant is aggrieved of his conviction and complains that once his and Martin's inadmissible statements are discounted, the remaining evidence is insufficient to establish beyond a reasonable doubt that he was the assailant. Alternatively, he maintains that the evidence supports, at most, a conviction for reckless homicide, not second degree murder. As we shall explain, we disagree and hold the evidence sufficient to support his conviction.

The standard for an appellate court when reviewing a challenge to the sufficiency of the evidence is "whether, considering the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002); *see also* Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2791-92 (1979); *State v. Hall*, 8 S.W.3d 593, 599 (Tenn. 1999). Because a verdict of guilt removes the presumption of innocence and imposes a presumption of guilt, the burden shifts to the defendant upon conviction to show why the evidence is insufficient to support the verdict. *See State v. Evans*, 108 S.W.3d 231, 237 (Tenn. 2003); *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000); *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). On appeal, the State is entitled to the strongest legitimate view of the evidence and to all reasonable and legitimate inferences that may be drawn therefrom. *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000); *see also Carruthers*, 35 S.W.3d at 558; *Hall*, 8 S.W.3d at 599.

A verdict of guilt by the trier of fact resolves all conflicts in the evidence in favor of the prosecution's theory. *See State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). "Questions about

the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this Court does not re-weigh or re-evaluate the evidence.” *Evans*, 108 S.W.3d at 236 (citing *Bland*, 958 S.W.2d at 659). Nor may this court substitute its own inferences drawn from circumstantial evidence for those drawn by the trier of fact. *Id.* at 236-37.

The Tennessee Code defines second degree murder, in part, as “[a] knowing killing of another.” T.C.A. § 39-13-210(a)(1) (2006). A “knowing” killing is one in which “the person is aware that the conduct is reasonably certain to cause [death].” *Id.* § 39-11-106(a)(20); *see also State v. Ducker*, 27 S.W.3d 889, 896 (Tenn. 2000).

Reckless homicide, a Class D felony, “is a reckless killing of another.” T.C.A. § 39-13-215(a) (2006). The culpable mental state of “reckless”

refers to a person who acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person’s standpoint.

Id. § 39-11-302(c).

The defendant argues that the evidence “is more closely akin to reckless homicide than second degree murder,” and he points out that the only proof of the manner of the victim’s death is provided by his statement to the police officers that the firearm accidentally discharged when the truck began to move. However, it was the jury’s province to determine which parts of the testimony and evidence to credit, inasmuch as there is no requirement that a jury must wholly accept or reject a witness’s account of events. *See State v. Bolin*, 922 S.W.2d 870, 876 (Tenn. 1996); *State v. Charles Drake*, No. E2004-00247-CCA-R3-CD, slip op. at 9 (Tenn. Crim. App., Knoxville, June 6, 2005). It was up to the jury to determine the believability of the defendant’s account of events. *See Charles Drake*, slip op. at 9-10. The jury in the instant case could and did reject the defendant’s version that the gun accidentally discharged causing the victim’s death. That determination was well within the jury’s realm, and we will not disturb the jury’s verdict.

Accordingly, in our opinion, a rational trier of fact could conclude beyond a reasonable doubt that the defendant knowingly killed the victim.

III. ADMISSIBILITY OF TESTIMONY

In this issue, the defendant maintains that the trial court should not have permitted the State to introduce the testimony of Michael Martin. Martin testified that the defendant made the statement, “I ain’t got no money, I’m flat going to rob somebody.” The defendant argues that the testimony was not relevant to any issue at trial, and even if relevant, its probative value was substantially outweighed by the danger of unfair prejudice. The State responds that the testimony was relevant to prove the element of premeditation, and if its admission was in error, the error was harmless because the jury found the defendant guilty of a knowing killing, supporting second degree murder, and not first degree premeditated murder.

The defendant frames this issue in terms of evidentiary relevancy, in which case, the trial court’s ruling on admissibility will be disturbed only upon a clear showing of abuse of discretion. *State v. Robinson*, 146 S.W.3d 469, 490 (Tenn. 2004).

Relevant evidence is evidence “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Tenn. R. Evid. 401. “All relevant evidence is admissible except as provided by the Constitution of the United States, the Constitution of Tennessee, these rules, or other rules or laws of general application in the courts of Tennessee. Evidence which is not relevant is not admissible.” *Id.* 402. However, “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” *Id.* 403.

The defendant insists that Martin’s testimony had no tendency to make more probable the allegation that he killed the victim, and he emphasizes that he was not charged with felony murder during the perpetration of a robbery. This argument overlooks that at trial, the defendant’s statements to the detectives established that he killed the victim; the disputed issues were intent and whether the shooting was an accident. Against that background, we are unpersuaded that Martin’s testimony was devoid of relevant value or that it was unduly prejudicial. We further note that the defense pursued a vigorous cross-examination of Martin that questioned the credibility and reliability of his testimony and that evidently swayed the jury to find the defendant guilty of the lesser included offense of second degree murder.

We hold that no abuse of discretion has been shown on appeal.

IV. JURY INSTRUCTION ON FLIGHT

In his next issue, the defendant argues that the trial court erred in instructing the jury on flight and the inference of guilt that may be justified from such flight.⁴ He insists that there was no evidence that he concealed himself within the community after the victim was shot and that whatever evasive action he took when confronted by the police was unrelated to the shooting and dealt with his drug possession. The State defends the flight instruction based on the evidence showing that the defendant fled the scene of the shooting and eluded the detectives for 11 days after the shooting. The State also contends that a flight instruction is not precluded when there are possibly multiple motives for flight. We agree with the State.

The trial court has a duty “to give a complete charge of the law applicable to the facts of a case.” *State v. Harbison*, 704 S.W.2d 314, 319 (Tenn. 1986); *see also* Tenn. R. Crim. P. 30. To properly charge the jury on flight as an inference of guilt, there must be sufficient evidence to support such instruction. *State v. Berry*, 141 S.W.3d 549, 588 (Tenn. 2004). Sufficient evidence supporting such instruction requires “both a leaving the scene of the difficulty and a subsequent hiding out, evasion, or concealment in the community.” *State v. Payton*, 782 S.W.2d 490, 498 (Tenn. Crim. App. 1989). Our supreme court has held that “[a] flight instruction is not prohibited when there are multiple motives for flight” and that “[a] defendant’s specific intent for fleeing a scene is a jury question.” *Berry*, 141 S.W.3d at 589.

In this case, the defendant left the scene of the shooting. He eluded the officers for 11 days. Twice the defendant ran when the detectives tried to stop him. The first time, the defendant successfully hid and avoided questioning. The second time, he did not succeed in his effort to flee, and when asked if he knew what the officers wanted to talk to him about, he immediately replied, “[A]bout that white man in the red truck.” The defendant also told the detectives that he ran from them because he had drugs in his possession. In our view, this evidence was sufficient to warrant an instruction of flight, and the trial court did not err by providing the instruction.

V. SENTENCING

In his final issue, the defendant complains that his sentence of 24-years’ imprisonment on his conviction of second degree murder is excessive because the trial court failed to apply two mitigating factors: (1) that because of his youth, he lacked substantial judgment in committing the offense, and (2) that he was raised in a dysfunctional family wherein his parents and siblings have criminal histories.

We note that at the beginning of the sentencing hearing, defense counsel stated orally on the record that the defendant elected to be sentenced under the new sentencing scheme that became effective for offenses committed on or after June 7, 2005, and that provided “for defendants who are sentenced after June 7, 2005, for offenses committed on or after July 1, 1982, the defendant may elect to be sentenced under the provisions of the act by executing a waiver of such defendant’s

⁴ The trial court gave the Tennessee Pattern Jury Instruction on flight. The defendant does not challenge the correctness of the charge; rather, he argues it was inapplicable in his case.

ex post facto provisions.” *See* 2005 Tenn. Pub. Acts ch. 353 § 18; T.C.A. § 40-35-102 (2006), Compiler’s Notes.

The offense for which the jury convicted the defendant occurred on October 27, 2003, and the defendant was sentenced on July 28, 2005. Therefore the defendant’s sentence is governed by the prior law unless he executed a waiver of his ex post facto protections. The record before us contains no executed waiver relative to sentencing, and the trial court did not address the defendant personally regarding his ex post facto waiver. Defense counsel’s oral statement that the defendant elected to be sentenced under the new sentencing scheme was an ineffectual attempt to waive the defendant’s ex post facto protections, *see State v. Timothy R. Bouton*, No. E2005-02294-CCA-R3-CD (Tenn. Crim. App., Knoxville, Aug. 17, 2006); consequently, the trial court applied the wrong sentencing law.

Consistent with previous treatment of a similar situation, *see id.*, we remand this case for resentencing under the old law or for a properly executed waiver of ex post facto protections.

VI. CONCLUSION

In accordance with the foregoing analysis, we affirm the defendant’s conviction of second degree murder, but we conclude that this case must be remanded to the trial court for resentencing consistent with this opinion.

JAMES CURWOOD WITT, JR., JUDGE